

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-014596

03/18/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

DOUGLAS J WILL

D JAY RYAN

v.

STATE OF ARIZONA BOARD OF
ACCOUNTANCY

SETH T HARGRAVES

OFFICE OF ADMINISTRATIVE
HEARINGS
VALERIE M ELLIOTT
AZ STATE BOARD OF
ACCOUNTANCY
100 N 15TH AVE, STE 165
PHOENIX AZ 85007

MINUTE ENTRY

This Court has jurisdiction of this administrative appeal pursuant to A.R.S. § 32-743(G) and the Administrative Review Act, A.R.S. § 12-901, et seq. This case has been under advisement and the Court has considered and reviewed the record of the proceedings before the Arizona State Board of Accountancy (“Board”) and the Office of Administrative Hearings (“OAH”) and the memoranda submitted by counsel. The OAH issued an administrative decision that suspended Plaintiff’s CPA certificate. Thereafter, the Board granted the State’s motion to rehear the case and modified the decision to revoke instead of suspend Plaintiff’s CPA certificate. Plaintiff contends the Board lacked jurisdiction to modify the OAH decision.

1. Standard of Review

The issues in this case concern the power of the Board to grant a rehearing and subsequently modify a final administrative decision issued by the OAH that became final by virtue of the Board’s failure to timely modify the Administrative Law Judge’s (“ALJ”)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-014596

03/18/2003

Recommended Decision. On appeal of an administrative board's decision pursuant to the Administrative Review Act, the Superior Court determines whether the administrative action was illegal, arbitrary, capricious, or was an abuse of discretion.¹ As to questions of fact, this court does not substitute its conclusion for that of the administrative agency, but reviews the record only to determine whether substantial evidence supports the agency's decision.² Questions of statutory interpretation involve questions of law and the appellate court is not bound by the administrative agency's conclusion.³ The reviewing court may draw its own conclusions as to whether the administrative agency erred in its interpretation and application of the law.⁴ Jurisdiction is a question of law that this Court reviews de novo.⁵

2. Factual and procedural background

The chronology of events is not in dispute. On May 25, 2001, Plaintiff Douglas Will entered guilty pleas to three class six felonies for the Facilitation of a Fraudulent Scheme or Artifice.⁶ Pursuant to the Superior Court's sentencing order, the Board was notified of Plaintiff's convictions. The Board then issued an Order of Summary Suspension against Plaintiff's CPA certificate and thereafter issued a Complaint and Notice of Hearing, setting the matter for an administrative hearing before OAH.⁷ Plaintiff did not appear at the January 28, 2002 hearing.⁸

On February 5, 2002, the ALJ issued his Recommended Decision and, at the suggestion of the Board's attorney present at the hearing, recommended that the Board find Plaintiff in violation of its statutes and that it suspend Plaintiff's CPA certificate for a time to run concurrently with the term of probation imposed in the criminal proceedings.⁹ The Board considered the ALJ's recommendations at its March 27, 2002, meeting and voted to exclude Finding of Fact No. 13 and to modify the sanction from suspension to revocation.¹⁰ The Board did not transmit its modifications to OAH as required by statute. On April 4, 2002, having no evidence of action by the Board, OAH certified the ALJ's recommendations as the final administrative decision of the State Board of Accountancy.¹¹

¹ A.R.S. § 12-910(G), *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136 (App. 1991).

² *Petrlas v. Arizona State Liquor Board*, 129 Ariz 449, 452, 631 P.2d 1107 (App. 1981).

³ *Seigal v. Arizona State Liquor Board*, supra.

⁴ *Carondelet Health Services v. Arizona Health Care Cost Containment System Administration*, 182 Ariz. 502, 504, 897 P.2d 1388 (App. 1995).

⁵ *In re Marriage of Crawford*, 180 Ariz. 324, 326, 884 P.2d 210, 212 (App. 1994).

⁶ Sentencing Order in *State of Arizona v. Will*, CR 1997-012943, May 25, 2001.

⁷ Order of Summary Suspension, dated October 4, 2001; Complaint and Notice of Public Hearing, dated November 6, 2001.

⁸ Recommended Decision of Administrative Law Judge, dated February 5, 2002.

⁹ Id.

¹⁰ Open Session Minutes from the March 27, 2002 Board meeting.

¹¹ Certification of Decision of Administrative law Judge, dated April 4, 2002.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-014596

03/18/2003

On April 8, 2002, the State, through the Attorney General's Office, filed with the Board a Motion for Rehearing, contending that merely suspending Plaintiff's certificate was an insufficient penalty.¹² Plaintiff responded and moved to strike the State's motion.¹³ On May 13, 2002, the Board granted the State's rehearing motion.¹⁴ On June 18, 2002, the Board reconsidered the OAH final administrative order and voted to revoke Plaintiff's CPA certificate.¹⁵ The Board issued its Order to that effect on July 2, 2002.¹⁶ Plaintiff seeks review of the Board's Order and contends that the Board lacked jurisdiction to rehear and modify the OAH final administrative order.

3. Power of Board to rehear final administrative decision

The general rule in Arizona has long been that the powers and duties of administrative agencies are to be measured by the statute creating them.¹⁷ Arizona courts have consistently held that a statute or properly adopted agency rule that authorizes rehearing provides an administrative agency with the power to reconsider its decisions.¹⁸ Moreover, if rehearing is authorized, an agency decision does not become final until a requested rehearing is denied or acted upon.¹⁹ In pertinent part, A.R.S. § 12-901(2) provides:

In all cases in which a statute or rule of the administrative agency requires or permits an application for a rehearing or other method of administrative review, and an application for a rehearing or review is made, no administrative decision of such agency is final as to the party applying for the rehearing or review until the rehearing or review is denied or the decision on rehearing or review is rendered.

¹² State's Motion for Rehearing, dated April 8, 2002.

¹³ Response to Motion for Rehearing and Cross-Motion to Strike Motion for Rehearing, dated April 15, 2002.

¹⁴ Open Session Minutes from the May 13, 2002 Board meeting.

¹⁵ Open Session Minutes from the June 18, 2002 Board meeting.

¹⁶ Order of the Board, with attachment, dated July 2, 2002.

¹⁷ E.g., *Ayala v. Hill*, 136 Ariz. 88, 664 P.2d 238 (App. 1983).

¹⁸ *Guminski v. Arizona State Veterinary Medical Examining Board*, 201 Ariz. 180, 33 P.3d 514 (App. 2001) (Administrative decision sanctioning Guminski became final upon the agency's denial of her request for rehearing because statutes and rules provide for rehearing of Veterinary Board's decisions.); *Boyce v. City of Scottsdale*, 157 Ariz. 265, 756 P.2d 934 (App. 1988) (A lawfully adopted rule providing for rehearing of decisions provides the Scottsdale's Board of Adjustment the power to reconsider its decisions.); *Sun Valley Express Moving and Storage, Inc. v. Arizona Department of Economic Security*, 140 Ariz. 131, 680 P.2d 841 (App. 1984) (Because the statute specifically authorizes the Department to reconsider a decision, the Department of Economic Security abused its discretion by refusing to reconsider a liability determination which had become final.)

¹⁹ A.R.S. § 12-901(2)(Supp. 2001).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-014596

03/18/2003

Relevant statutes and administrative rules provide for rehearing of the Board's decisions. A.R.S. § 41-1092.09(A)(1) provides that "[a] party may file a motion for rehearing or review within thirty days after service of the final administrative decision." Pursuant to A.R.S. § 41-1092.09(B), with respect to a contested case with a self-supporting regulatory board, a party is required to seek rehearing within thirty days after service of the administrative decision in order to exhaust the party's administrative remedies. R4-1-114 is the applicable rule governing rehearing of the Board's decisions. R4-1-114(B.) provides that the Board's decision approving or modifying the ALJ's recommendations is the final decision of the Board, "subject to the filing of a motion for rehearing..." R4-1-114(C.) provides for rehearing upon motion of any party aggrieved by a decision of the Board. These statutory provisions and agency rules that authorize rehearing provide the Board with the power to reconsider its decisions.

4. The Board's jurisdiction to rehear the OAH final administrative decision.

Plaintiff contends that the Board "lost any jurisdiction in this case other than a Title 12 appeal when the OAH issued its final administrative decision."²⁰ In support of his argument, Plaintiff cites A.R.S. § 41-1092(5) that defines "final administrative decision" as "a decision by an agency that is subject to judicial review pursuant to title 12, chapter 7, article 6."²¹ Plaintiff argues that because the OAH order was a final administrative decision pursuant to the procedures established in A.R.S. § 41-1092, the Board was divested of jurisdiction to take further action. Plaintiff begs the question however, because A.R.S. § 41-1092(9) itself provides for rehearing of a final administrative decision.

Plaintiff argues that the purpose of finality of the decision is so that the option to appeal becomes available.²² However, the option to appeal any final decision does not become available until a request for rehearing is acted upon. A.R.S. § 12-901(2). Accordingly, identifying an order as final is not inconsistent with rehearing that order. Because the Board can change the order on rehearing, it is authorized to reconsider its decisions.²³

In *Better Homes Construction Inc., v. Goldwater*,²⁴ the Registrar of Contractors rejected the ALJ's recommended order in that the Registrar decided to revoke Better Homes' license, not merely suspend it. Better Homes contended that the revocation decision was barred by the earlier decision of the ALJ. The court disagreed. "Because Better Homes requested a rehearing after the initial decision, the first decision never became a final administrative decision. Rather,

²⁰ Opening Brief, page 6.

²¹ Opening Brief, page 10.

²² Id.

²³ *Wammack v. Industrial Commission*, 83 Ariz. 321, 320 P.2d 950 (1958) ("The power to reconsider is inherent in the power to decide.").

²⁴ 203 Ariz. 295, 53 P.3d 1139 (App.2002).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-014596

03/18/2003

the decision upon rehearing, the one that revoked Better Homes' license, became the *only* final decision."²⁵

Plaintiff attempts to distinguish *Better Homes* because in that case the Registrar acted timely. However, in this case, the motion for rehearing was filed within 30 days of the OAH order and was therefore timely under the statute providing for rehearing. Plaintiff, in fact, argues that the Board's authority to modify the decision is limited to the 30 day period after the ALJ's recommended decision. If the Board fails to act in that time, Plaintiff argues, it cannot reconsider the decision. This argument ignores the Board's power to reconsider a final decision upon rehearing.²⁶

The ALJ's recommendation becomes the final decision when the Board fails to accept, reject or modify it within thirty days. A.R.S. § 41-1092.08(D.) Here, the Board attempted to modify the recommended decision but did not accomplish that modification because it did not transmit its action to the OAH.²⁷ Upon rehearing, the Board modified the OAH decision and that action became the final administrative decision.

Plaintiff argues that the OAH order is final and not subject to modification because the language of the OAH order specifically provides that "the State Board of Accountancy may not modify or reject this recommended decision."²⁸ However, this OAH order also advised of the rehearing procedures. The "may not modify or reject" provision must be construed to mean subject to rehearing. Otherwise the order is internally inconsistent and is inconsistent with the statutes that provide for rehearing. Like the definition of final administrative decision, the OAH language does not preclude a rehearing.

A board, commission or tribunal can use its appropriate modification power to reconsider decisions until the time when an appeal is perfected.²⁹ The effect of an appeal is to deprive the board of jurisdiction to proceed further.³⁰ It is the appeal that divests the board of jurisdiction.

5. The Board recommended suspension at the OAH hearing

Plaintiff argues extensively that the Board recommended suspension as the appropriate sanction during the hearing before the ALJ.³¹ When the ALJ recommended suspension of the CPA certificate, the Board "got what it wanted."³² Plaintiff does not argue the significance of

²⁵ Id.

²⁶ *Wammack v. Industrial Commission*, supra.

²⁷ Open Session Minutes of Board Meeting, March 27, 2002; OAH Order dated April 4, 2002.

²⁸ OAH Certification of Decision, dated April 4, 2002.

²⁹ *Am. Smelting & Ref. Co v. Arizona Pollution Control Bd*, 113 Ariz. 243, 244, 550 P.2d 621, 622 (1976).

³⁰ Id.

³¹ Opening Brief pages 6-7, 9.

³² Opening Brief, page 9.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-014596

03/18/2003

this fact. The Board is not bound by its suggestion to the ALJ because it is not bound by the ALJ's recommended decision. It is specifically authorized to reject or modify the ALJ's proposed order. Moreover, Plaintiff cannot be said to have relied on the position stated by the Board at the hearing or to have relied on the recommended decision. Plaintiff did not appear at the hearing.³³ Plaintiff was not served with and was not entitled to be served with the recommended decision.³⁴ Had the Board successfully modified the ALJ recommended order, as it attempted to do, Plaintiff would be in the same position he is in now.

6. Finding of Fact #13

Plaintiff contends that the Board's action is arbitrary because its order ignores and is inconsistent with its own Finding of Fact # 13 ("FOF 13").³⁵ FOF 13 provides:

Respondent should be precluded from practicing and holding himself out as a certified public accountant in the State of Arizona while on criminal probation. The Board's desire to impose a disciplinary penalty in the form of suspension of Respondent's certification concurrent with the term of his criminal probation will serve to protect the public from any certified public accounting by Respondent.

Plaintiff contends that the Board's Order revoking his CPA certification is internally inconsistent because it adopts the ALJ's Findings of Fact including FOF 13 and at the same time orders revocation as the "most appropriate and effective disciplinary action."³⁶ The Board argues that FOF 13 is not "actually a factual finding but instead is a conclusory statement regarding the Board's attorney's suggestion as to what the consequences of Plaintiff's misconduct might be."³⁷ FOF 13 is not controlling as to whether Plaintiff's certification should be revoked or suspended. The finding is not inconsistent with the revocation order because the Board is empowered to change its decision and the ALJ's findings provided substantial support for the Board's revocation order. The Board's revocation order is supported by the substantial evidence presented regarding Plaintiff's criminal convictions.

7. The State requested the rehearing

In his reply brief the Plaintiff argues that the Board and the State are the same entity and that neither the Board nor the State is a party that can request a rehearing.³⁸ The Board contends that these arguments are improper and are waived because they were not clearly raised and argued in

³³ ALJ's recommended decision, dated February 5, 2002.

³⁴ A.R.S. § 41-1092.08(A).

³⁵ Opening Brief, p.12.

³⁶ Order, dated July 2, 2002.

³⁷ Answering Brief, page 14.

³⁸ Reply Brief, *passim*.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-014596

03/18/2003

Plaintiff's opening brief.³⁹ In his reply brief, Plaintiff refers to portions of his opening brief that purport to raise and brief these arguments.⁴⁰ However, the portions referenced do not present any substantive argument regarding the issue and do not cite any authority regarding this issue. Moreover, the referenced portions are either recitations of what happened below or they are, at best, ambiguous statements that are easily interpreted to refer to the finality arguments plaintiff actually raised in his opening brief. In either case, no substantive argument is presented on the issue in the opening brief. Issues not clearly raised and argued in a party's appellate brief are waived.⁴¹ Substantive argument and citation to authority regarding this issue appear for the first time on appeal in Plaintiff's Reply Brief.⁴² Arguments not presented until the reply brief may not be considered by the appellate court.⁴³ The court declines to address the issue whether the State properly brought a motion for rehearing.

Moreover, this issue does not appear to be dispositive. The Board is authorized to reconsider its decisions even when the statute does not specifically provide for the action taken.⁴⁴ Because the Board is authorized to rehear its decisions, it has power to reconsider and change them.⁴⁵

8. Conclusion

The Board attempted to modify the ALJ's recommended decision. It was unsuccessful because it failed to transmit its action to OAH. The Board used the rehearing procedure to correct its mistake. Plaintiff contends that the Board's failure to transmit its modification of the OAH recommended decision prohibited the Board from modifying the OAH decision as it purported to do upon rehearing. The purpose of the rehearing provision is to give the Board an opportunity to correct its own mistakes before the matter is brought to court.⁴⁶ The rehearing provision should be construed so as to uphold that purpose.

In addition, the purpose of the regulation of accountancy is to protect the public. Where the purpose of a regulation is to protect the public, the statute should be construed so as to uphold that purpose. "We further note that we should liberally construe a statute whose purpose is the

³⁹ Answering Brief, p. 3, n. 1; Board's Objection and Motion to Strike Portions of Plaintiff's Reply Brief, dated December 18, 2002. Because the issue is not clearly raised or argued in the opening brief, the Board did not respond to it in its answering brief.

⁴⁰ Reply Brief, page 4.

⁴¹ *Schabel v. Deer Valley Unified Sch. Dist. No. 97*, 186 Ariz. 161, 167, 920 P.2d 41, 47 (App. 1996).

⁴² Plaintiff's Reply Brief, pages 1-5.

⁴³ *Anderson v. County Life Ins. Co.*, 180 Ariz. 625, 636, 886 P.2d 1381, 1392 (App. 1994).

⁴⁴ In *Wammack*, appeal was from a second rehearing that was not provided for by statute. The court concluded that the Commission had inherent authority to reconsider its decision. *Wammack* was subsequently limited to agencies, such as the Board in this case, that have statutory authority to rehear their decisions. *Ayala v. Hill*, 136 Ariz. at 91, 664 P.2d at 241.

⁴⁵ *Id.*

⁴⁶ *Cogent Public Serv., Inc. v. Arizona Corp. Comm'n*, 142 Ariz. 52, 54, 688 P.2d 698, 700 (App. 1984).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-014596

03/18/2003

protection of the public in order to achieve its objective.”⁴⁷ Moreover, the Board’s order is not unfair to Plaintiff because the rehearing request was timely filed. Plaintiff is in the same position he would be in had the Board successfully modified the recommended decision as it attempted to do. The rehearing procedures were well within the statutory time limits. The time for appeal had not run and Plaintiff received the OAH final administrative decision only days before the Board embarked on its rehearing procedures. The court concludes that in this case, pursuant to its rehearing jurisdiction and its inherent power to reconsider its decisions, the Board could correct its mistake until such time as it was divested of jurisdiction by an appeal.

IT IS THEREFORE ORDERED denying all relief requested by the Plaintiff and affirming the decision and determination made by the Arizona State Board of Accountancy.

IT IS FURTHER ORDERED denying Plaintiff’s request for attorneys fees.

IT IS FURTHER ORDERED THAT Defendant lodge a judgment consistent with this minute entry by April 21, 2003.

⁴⁷ Better Homes Construction, Inc. v. Goldwater, 203 Ariz. at 300, 53 P.3d at 1144.